



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

No. 78-860

HARRY WOLKIND,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITIONER'S RESPONSE TO BRIEF IN
OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI

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Respondent has not contended that this case is not worthy of certiorari. Accordingly this Response is written only to clarify the limited scope of petitioner's contention before this Court and briefly to address the question of the legitimacy of petitioner's expectation of privacy; i.e., the question of petitioner's "standing" to assert his fourth amendment rights. In light of respondent's Brief in Opposition to issuance of the writ, petitioner begins by identifying some contentions he does not make in this Court.

Petitioner does not contend that Czar, the detector dog, is less than perfect in locating particular hidden substances. Petitioner has not argued here that the police, after Czar "alerted" on a train in their jurisdiction, acted unreasonably.¹ Petitioner's position is simply that when the police first used Czar in the corridor to confirm a hunch about what lay in petitioner's suitcases they violated petitioner's right to the assurance that his privacy will be judicially protected from arbitrary police intrusion.

In this case the only reason police boarded petitioner's car of the train was because an unidentified individual in Florida became suspicious.² Petitioner was searched in Henrico County, Virginia, because "dogs are very scarce along our lines and . . . [there were not] any other animals . . . [available]." (Tr. I 113) The question presented is whether police may thus search individuals for contraband without obtaining the approval of a judicial officer.

¹ Accordingly, petitioner does not argue that the police need have held the train to go through the formality of obtaining a warrant once Czar told them that there was no doubt that petitioner's compartment contained contraband. Before Czar was brought to the station police had adequate time to obtain a warrant but of course had nothing approaching a basis upon which to do so.

² The asserted basis for that suspicion — a "match" with a "profile" — is in fact a simple description: petitioner was a young man traveling north first class who had appeared nervous to the observer. The record reveals no testimony or statistical evidence regarding how accurate the "profile" used by the police here was in picking out individuals possessing contraband. (See. Tr. I 47-71.) Nor is there any indication of what discretion police had in interpreting and acting upon particular profile comparisons. Neither party in this case has ever contended that the "profile" was more than minimally relevant. What the parties differ about is whether petitioner's "match" with the "profile," non-probative as that "match" was, could legitimize the warrantless use of Czar several hours later.

The microphone located in a place open to the public in *Katz v. United States*, 389 U.S. 347 (1967), detected vibrations of a closed telephone booth's glass caused by Katz speaking into the telephone within. Katz knew that all of the sound that left his mouth would not be captured and transmitted by the telephone. Inevitably such uncaptured sound must escape the booth and be un-owned in a public place. The point, notwithstanding the inexorable laws of physics, is that when a person uses a private telephone booth he becomes "entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." 389 U.S. 352.³ *Katz* holds that a person's expectation of privacy should not fail merely because police can defeat it without effecting a physical trespass.

In *Rakas v. Illinois*, ___ U.S. ___, No. 77-5781 (12/5/78), Justice Rehnquist explained that one who has a right to exclude others from enjoyment of property likely will have a legitimate expectation of privacy by virtue of having that right. Petitioner has this right with respect to the sealed luggage in his private roomette and is entitled to assume that his expectation of privacy will not be defeated. See *United States v. Chadwick*, 433 U.S. 1 (1977); cf. *McDonald v. United States*, 335 U.S. 451 (1948). Petitioner does not have a right to exclude people from the hall, but to say that he therefore may not legitimately expect that people located in the hall will respect his interest in the privacy of his room and his

³ Respondent's suggestion that *Katz* should be limited to situations where police have probable cause to search before they use a device—and fail nonetheless to use the device by authority of a warrant—is puzzling. It would reward ignorant police by permitting them to search at random and would penalize the skillful policeman by requiring that he obtain a warrant.

luggage—to say that police may lawfully inquire into a secret place by detecting and interpreting an incidental and inevitable molecular discharge into a public place—posits that the constitutional right to have private places extends no farther than the rights protected by the common law of trespass. This is precisely contrary to *Katz*. This is not the teaching of *Rakas*. The most sophisticated “lock” is only effective in the absence of devices that can defeat its purpose.

If certain cases stand contrary to the proposition that what petitioner carried was private to him, then it is clear that they qualify an individual’s right to be free of unwarranted intrusions into his most personal possessions. They undercut the decisions of this Court by permitting invasions of recognized sanctums of privacy without any judicial restraint or review whenever the invasion can be accomplished from places open to the public.⁴

In this case petitioner’s expectation of privacy from poking noses such as Czar’s matches the specific factors mentioned in the concurring opinion in *Rakas* as relevant to whether a person’s fourth amendment rights have been violated.

“In considering the reasonableness of asserted privacy expectations, the Court has recognized that

⁴ Respondent’s informant theory similarly fails to account for the interest invaded. Informants may not break locked compartments to discover their contents when police order them to do so. Czar acts to inform, but he does so no differently than the sensitive microphone or x-ray machine. Czar’s use to inform is unlawful here because his use infringed an interest of the petitioner that the fourth amendment was designed to protect—the petitioner’s interest in the privacy of the contents of his luggage. The informant theory begs the question, eliding the issue whether an instrumentality of the state may defeat a legitimate expectation of privacy.

no single factor invariably will be determinative. Thus, the Court has examined whether a person invoking the protection of the Fourth Amendment took normal precautions to maintain his privacy—that is, precautions customarily taken by those seeking privacy. See, e.g., *United States v. Chadwick*, 433 U.S. 1, 11 (1977) (“By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination”); *Katz v. United States*, 389 U.S. 347, 352 (1967) (“One who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world”). Similarly, the Court has looked to the way a person has used a location, to determine whether the Fourth Amendment should protect his expectations of privacy. In *Jones v. United States*, 362 U.S. 257 (1960), for example, the Court found that the defendant had a Fourth Amendment privacy interest in an apartment in which he had slept and in which he kept his clothing. The Court on occasion also has looked to history to discern whether certain types of government intrusions were perceived to be objectionable by the Framers of the Fourth Amendment. See *United States v. Chadwick*, 433 U.S., at 7-9. And, as the Court states today, property rights reflect society’s explicit recognition of a person’s authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual’s expectations of privacy are reasonable. See *Alderman v. United States*, 394 U.S. 165 (1969).” *Rakas v. Illinois*, ___ U.S. ___, No. 77-5781 (12/5/78) (Powell, concurring).

It is undisputed that petitioner took precautions to keep secret the contents of his luggage, and used his roomette and stored the luggage in a manner that is indistinguishable from that of the victim of the search in *Jones*. Viewing the question historically, it is hard to conceive that the founding fathers would have found any less objectionable a search for untaxed quantities of tea by the use of dogs than by the general search. To posit, when a detector dog is used in public places to determine the contents of sealed luggage in private places, that the societally recognized sanctity of such luggage is not offended or that the individual possessing such luggage is not the victim of state activity that invades his privacy, "does little . . . to enhance the notion of privacy and drains the word 'search' of its commonsense meaning." Peebles, *The Uninvited Canine Nose and the Right to Privacy, Some Thoughts on Katz and Dogs*, 11 Ga. L. Rev. 75, 89 (1976). If use of Czar does not violate petitioner's right to privacy simply because Czar can work from a public place, then no property can be safe from long range surveillance through detection of invisible light waves, inaudible sound waves or imperceptible molecules.

CONCLUSION

For the reasons stated in the Petition for Certiorari and in this Response, petitioner requests that this Court issue its writ.

Respectfully submitted,

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